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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

**No. 554**

**POPEIL BROTHERS, INC.,**

*Petitioner,*

vs.

**KARL ZYSSET and NEW-NEL KITCHEN PRODUCTS COMPANY,**

*Respondents.*

## RESPONDENTS' REPLY TO PETITIONER'S "MOTION FOR LEAVE TO FILE NEW AND ADDITIONAL CONFLICTING AUTHORITY IN SUPPORT OF PETITION FOR CERTIORARI (AND APPENDIX)"

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The motion to file an additional authority should be denied.

The Petition for Writ of Certiorari was predicated, in part, upon the patently erroneous premise that the judgment of the Court of Appeals is "in direct conflict with controlling decisions of this Court and the Courts of Ap-

peals * * *." Petition, page 8. A number of this Court's decisions allegedly supporting that contention were cited in the Petition at pages 9 and 10.

The Sixth Circuit Court of Appeals in the case of *Holstensson v. U-M Corporation*, 139 USPQ 491, by which case Petitioner seeks to reargue points already fully briefed by it, was acknowledged by Petitioner to follow Supreme Court cases already cited by it and was said by the Sixth Circuit Court itself to parallel closely the case of *Lincoln Engineering v. Stewart-Warner Corp.*, 303 U.S. 545. That very case was relied upon in the Petition at page 10. How that Sixth Circuit opinion can assist this Court in ascertaining what this Court's decision in the *Lincoln Engineering Co.* case means escapes respondents.

Thus, both the line of authority exemplified by the *Holstensson* case (with which respondents have no quarrel) and the manufactured and non-existent conflict said by petitioner to result therefrom have already been fully exploited.

The fact is that cases such as *Holstensson* and *Lincoln Engineering* deal with situations in which a claimed combination functions no differently even though one of the elements be new. Such factual situations are dealt with similarly in the courts of the Seventh Circuit as, for example, in *Hobbs v. Wisconsin Power & Light Co.*, 250 F. 2d 100, 106 (C.A. 7, 1958), *cert. den.* 356 U.S. 932, in which the court relied upon the *Lincoln Engineering Co.* case, and cases there cited.

The Seventh Circuit Court of Appeals correctly held that the claimed combination of the Zysset patent was both new as a combination and "produced a result" which

was an improvement over the art. "It is the [novel] *combination* which was held valid and infringed—not any particular element thereof, *per se*." 318 F. 2d 701, 704. The Zysset combination functioned differently from prior art choppers and provided an improved and superior food chopping means. In the words of this Court, quoted by the Court of Appeals, the novel combination possessed the "impalpable something which distinguishes invention from simple mechanical skill."

It is crystal clear that the real purpose of Petitioner's motion is to rewarm and rehash its shopworn contentions while continuing to ignore the facts of this case.

Petitioner's unjustified motion is another of its long series of unconscionable and dilatory tactics, the accumulated like of which is unparalleled in patent litigation, to frustrate the judgments of the courts and to thwart justice. Like its failure to serve respondents with copies of the Reply brief filed in this Court on December 11, 1963[1] while representing to this Court that it had made such service, this motion demonstrates petitioner's utter contempt for the law, for the Rules of this Court and for common decency and fair play.

There is no conflict. If there be one it is only between what the facts are and what petitioner would prefer them to be. The attempt by this motion to reargue matters al-

[1] Only by happenstance were both of the respondents first made aware, on January 8, 1964 that a Reply brief indeed had been filed by petitioner.

ready briefed and the disregard and contempt of petitioner for the Rules of this Court should not be rewarded by granting this motion. The motion should be denied.

Respectfully submitted.

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## CERTIFICATE OF SERVICE

I certify that the foregoing Reply was served by mailing copies of the same to Messrs. George B. Christensen, 38 South Dearborn Street, Chicago, Illinois, 60603, Dugald S. McDougall, 135 South La Salle Street, Chicago, Illinois, 60603, and Jay Erens, 100 South Wacker Drive, Chicago, Illinois, 60606, attorneys for Petitioner, this 14th day of January, 1964.

/s/ ALBIN C. AHLBERG